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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~959~~ 70-31

CHARLES R. PERRY, ET AL., *Petitioners,*

v.

ROBERT P. SINDERMANN, for himself and for all others similarly situated, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN RESPONSE TO THE PETITION

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN RESPONSE TO THE PETITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the National Education Association (NEA) and respectfully moves this Court, pursuant to Rule 42, paragraph 3, of the Rules of this Court,

for leave to file the accompanying brief as *amicus curiae* in this case.

The interest of the NEA and its reasons for asking leave to file a brief *amicus curiae* are set forth in the accompanying brief.

Respectfully submitted,

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN RESPONSE TO THE PETITION

The National Education Association of the United States (NEA), upon motion seeks to appear as *amicus curiae* in the present case.[1] In the court below, NEA

[1] A letter from counsel for petitioners consenting to NEA's participation as *amicus curiae* has been filed with the Clerk of this Court. Counsel for respondent, however, upon instructions from respondent, have not consented to NEA's participation as *amicus curiae*.

appeared as *amicus curiae* in support of the respondent on the merits. NEA appears in this Court at the present stage of the proceedings to urge that the writ of certiorari be granted because of the direct conflict among decisions of the courts of appeals on the constitutional issues involved and because of the great importance of these constitutional issues.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet.[2] App. A) is reported at 430 F.2d 939 (1970). The findings and conclusions of the United States District Court for the Western District of Texas (R. 99-101)[3] are set forth in footnote 7 of the opinion of the Court of Appeals (Pet. App. A, at 6 n. 7).[4]

QUESTIONS PRESENTED

This case, brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, raises two constitutional issues:

1. Whether a complaint by a nontenured teacher in a public educational institution, alleging that the teacher's contract was not renewed because he exercised First Amendment rights of expression, association and petition, states a claim under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, upon which relief can be granted.

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[2] "Pet." refers to the Petition for a Writ of Certiorari herein.

[3] "R." refers to the Appendix in the Fifth Circuit.

[4] "Jurisdiction" and "Constitutional Provisions and Statutes Involved" are as set forth in the Petition (at 2, 3-5).

2. Whether a nontenured teacher's rights of procedural due process under the Fourteenth Amendment are violated when a public educational institution, in refusing to renew the teacher's contract, fails to provide the teacher with notice and the opportunity for a hearing.

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

The NEA has a special interest in the issues presented here. NEA was founded in 1857 and chartered as a non-profit corporation by act of Congress in 1906. Its membership includes more than one million professional educators, many of whom are nontenured teachers. Its charter purpose is to improve the character and advance the interest of the teaching profession and the cause of education in the United States.

To this end, NEA has appeared as *amicus curiae* during 1970 not only before the court below in the present case, but also before this Court in *Jones* v. *Hopper,* 397 U.S. 991 (1970), *denying cert.,* 410 F.2d 1323 (10th Cir. 1969), and in a number of cases now pending on appeal in other federal courts of appeals, which, although involving different facts, raise essentially the same legal issues as are presented here. *See Drown* v. *Portsmouth School District,* Dkt. No. 7667, 1st Cir.; *Orr* v. *Trinter,* Dkt. No. 20721 (6th Cir.); *Roth* v. *Board of Regents,* Dkt. No. 18490 (7th Cir.).

NEA has also established a fund for the protection of teacher rights, known as the "DuShane Fund," through which it has supported cases across the nation, raising issues which are the same as, or similar to, those raised in the present case.

Because NEA is an organization of professional educators and has been deeply involved in cases comparable to the present case, it has gained special background, experience and competence which it desires to bring to bear on the issues raised by the present case.

For the foregoing reasons, NEA requests leave to appear as *amicus curiae* to urge that certiorari be granted. Should the writ issue, NEA will seek to appear in support of the respondent on the merits of the issues raised.

STATEMENT

The respondent, Robert P. Sindermann, was initially employed as a lecturer for the academic year 1965-66 to teach Government in the Department of Social Science at Odessa Junior College, Odessa, Texas ("the College")—part of the public educational system of the State of Texas. He previously had taught for four years at San Antonio Junior College, San Antonio, Texas, and for over two years at the University of Texas, both of which are also state educational institutions (*see* R. 13). In addition to his teaching duties at the College, respondent also served as co-chairman of the Social Science Department until the fall of 1968.

By a succession of one-year contracts, Sindermann continued as a faculty member of the College until the end of the 1968-69 academic term (Pet. App. A, at 2). On May 19, 1969, respondent, without any advance written notice and without a prior hearing, received from petitioner Charles R. Perry, the President of the College, a letter informing him that his teaching contract would not be renewed for the next academic year (*see* R. 87). The letter stated (R. 41): "The Board of Regents on May 6, 1969, voted to

approve my recommendation not to renew your contract for 1969-70. You have been supplied with a statement, with attachments, indicating the basis for this recommendation." The "statement" referred to was a public press release issued by the President's office on May 13, 1969.[5]

Three days thereafter, respondent brought suit against the President and Board of Regents of the College, claiming a deprivation of civil rights in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983. The Complaint alleged that the refusal of the College authorities to renew respondent's contract was based solely on his exercise of First and Fourteenth Amendment rights of expression, association, and petition and that, in connection with this refusal, his rights to procedural due process had been violated (*see* Pet. App. A, at 2).

As characterized by the court below, the reasons for respondent's contract nonrenewal were as follows (Pet. App. A, at 4):[6]

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[5] The press release is reprinted in its entirety as Appendix A to the original Complaint (R. 13-25).

[6] Neither in the pleadings nor in any other part of the record before the district court did the petitioners assert that the refusal to renew respondent's contract to teach rested upon the Board of Regents' judgment that respondent was "incompetent" or otherwise incapable of instructing in the subjects assigned to him. On the contrary, a statement dated May 15, 1969, and signed by most of the faculty of the College's Social Science Department attested that plaintiff "is a totally competent person professionally" and that "nothing that he has said or done has, in any way, derogated from his competence in the classroom as a lecturer in Government" at the College (R. 40). The court of appeals observed that "[t]he validity of Professor Sindermann's work . . . was recognized by his nomination to be co-chairman of the Social Science Department with an increase in pay" (Pet. App. A, at 3).

(1) "Sindermann . . . aligned himself with a group known as 'The Committee to Elevate Odessa College', a group seeking to raise Odessa College to a 4-year status—a move officially opposed by the Board of Regents."

(2) "Plaintiff's name appeared as sponsoring a newspaper advertisement ridiculing the position taken by the Board of Regents on Odessa College's 4-year status."[7]

(3) "On at least four occasions Sindermann requested permission from college officials to absent himself from the campus and his teaching duties in order to testify before committees of the Texas legislature on a bill relating to academic freedom and tenure. These requests were each refused but Professor Sindermann nevertheless attended the committee hearings."

This last reason derives from respondent's election as President of the Texas Junior College Teachers Association in February 1969 (R. 14, 84). As President, Sindermann was invited to testify in April 1969 (R. 38, 39) at hearings of the Senate State Affairs Committee of the Texas State Legislature on pending legislation relating to academic freedom and tenure (R. 84-85). On April 9, Sindermann requested permission from the Chairman of his Department to be absent from classes on April 23 in order to appear before the legislative committee (*see* R. 18). He had stated that substitute teachers were available and that he would reimburse the College for any expense incurred for the substitute teachers.

---

[7] The court below also observed that "Sindermann disclaimed any connection with the advertisement but the press release held that his 'guilt by association' could not be rejected because he allied himself with the Committee to Elevate Odessa College" (Pet. App. A, at 4 n. 5; *see* R. 17).

On April 10, the President of the College denied respondent's request on the grounds that he could contribute to the College "only by being present to teach," that the Teachers' Association should be represented at the legislative hearing by the Association's Legislative Committee Chairman and not by its President, and that the Association had not endorsed the pending bill on which respondent was to testify (R. 18-19). These grounds were restated by the President directly to respondent on April 22, the day before he was to appear before the legislative committee (R. 21). Respondent was nonetheless absent from his classes on April 23 in order to testify before the Committee, and his classes were taught on that day by substitute teachers (*id.*).

On April 25, respondent requested permission to absent himself again from classes in order to testify before the legislative committee. Once more, he pointed to the availability of substitute teachers and his willingness to reimburse the College for any expense. Respondent's request was denied on April 26 (R. 21). On April 27, he informed the Chairman of the Social Science Department that he would be absent from classes on April 28 in order to testify at the legislative committee hearing (R. 22).

Subsequent to Board action on May 6th, in which respondent's contract was not renewed, but prior to the May 19th notice, respondent requested two further absences to testify before the legislature in May. These requests were also refused (R. 23-25).

On the basis of these incidents, Sindermann alleged in his Complaint (R. 6) and Amended Complaint (R. 85), and petitioners admitted in their answers (R. 46, 51, 56), "that one of the reasons for the

Plaintiff not being retained for the academic year 1969-1970 was his unauthorized trip to Austin, Texas, to testify without receiving the college Administration's approval."

At the time respondent was absent from classes to testify before the legislative committee, there was in effect at the College a regulation governing approved and authorized absences by faculty members and the manner in which unauthorized and unapproved absences were to be treated. This regulation, appearing in the "Faculty Guide of Odessa College," promulgated by the administration of the College, stated (Complaint, App. G, at 52-53, emphasis added):

> "*Faculty Absences:*
>
> . . . . .
>
> "Arrangements for absence with full pay shall be made in advance by the employee. Approval for absence because of personal or family illness shall be granted by the departmental chairman and the Dean of the College. Approval of absence for other causes shall be obtained from the Dean of the College and subject to final approval by the President. *The employee shall have 1/180 of his annual salary deducted for each day of such absence not approved by the departmental chairmen, the Dean of the College, or the President.*"

In his Complaint, Sindermann claimed that the nonrenewal of his contract, unless restrained, would cause him "damages to his professional reputation and standing," and that he had already suffered "actual damages to his reputation" and "to his ability to obtain similar employment in other colleges in the State of Texas" (R. 89). Respondent thus requested the trial court, *inter alia,* to declare that his contract

nonrenewal was a violation of his substantive rights under the First and Fourteenth Amendments and of his procedural due process rights under the Fourteenth Amendment, to require the Board of Education to grant him "a hearing on the reasons for his dismissal," including formal written charges, and to direct the Board to reinstate him as a member of the faculty (R. 90, 93).

Petitioners filed a Motion for Summary Judgment (R. 66-75), alleging, *inter alia* (R. 73):

> "Not only has [respondent] flaunted his insubordination before his superiors at the College, but he now flaunts that same insubordination before this Court by pleading affirmatively his willful disregard of written instructions of his superiors. The matter is one solely and entirely of discipline for insubordination. As a matter of law, the insubordination is . . . adequate and sufficient reason for the nonrenewal of this contract . . . ."

The district court granted the motion (R. 99-101; Pet. App. A, at 6 n. 7), relying on its determination that respondent's contract with the College had terminated by its terms at the end of the 1969 school year, that respondent had no tenure at the College, that the College had no contractual obligation to renew respondent's contract, and that the College authorities had therefore not violated any of his constitutional rights.

On appeal, the Fifth Circuit reversed the lower court's ruling on the grounds that the rights sought to be enforced by respondent—rights derived from the First and Fourteenth Amendments—were constitutional rather than contractual and that therefore

summary judgment should not have been granted. With respect to petitioners' argument that Sindermann's "insubordination" was the reason for their nonrenewal of his contract, the court stated (Pet. App. A, at 7):

> "We reject the sophistry which would recognize that the college could not withhold renewal of Sindermann's contract because of his association with the Committee to Elevate Odessa College or because of his exercise of a reasonable right to petition the legislature by attending committee hearings but, at the same time, recognize a right in the college administration to direct him not to exercise these rights then refuse to renew his contract for disobedience of their orders."

The appellate court below further specified certain minimum requirements of procedural due process that the College authorities had failed to follow in deciding not to renew respondent's teaching contract. The court entered judgment (Pet. App. B) remanding the cause for further proceedings consistent with its opinion.

REASONS FOR GRANTING THE WRIT

I

There Is a Conflict Among the Circuits on the Issue Whether a Nontenured Teacher's Allegation That His Contract Was Not Renewed Because He Exercised First Amendment Rights Is Sufficient To State a Claim Under the Civil Rights Act.

In reversing the trial court's entry of summary judgment for the school authorities on the ground that respondent Sindermann had no tenure or contract rights upon which he could base his claim, the Fifth Circuit relied upon its previous decision in *Pred* v.

Board of Pub. Instr., 415 F.2d 851 (1969), "which classifies the rights of persons circumstanced such as plaintiff as constitutional rather than contractual" (Pet. App. A, at 2).

This fundamental difference in approach, according to the court below, has created an "as yet unresolved conflict between circuits" (*id.*), aligning the Fifth Circuit by its decisions in *Sindermann* and *Pred* with the Fourth Circuit in *Johnson* v. *Branch*, 364 F.2d 177 (1966) (en banc), *cert. denied*, 385 U.S. 1003 (1967), and against the Tenth Circuit in *Jones* v. *Hopper*, 410 F.2d 1323 (1969) (en banc), *cert. denied*, 397 U.S. 991 (1970). The Fifth Circuit's decisions, as well as the Fourth Circuit's decision in *Johnson*, are also in direct conflict with an earlier opinion of the Fourth Circuit—*Parker* v. *Board of Educ.*, 348 F.2d 464, *affirming* 237 F. Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), a case similar to *Jones*.

The facts of the *Jones* case closely parallel those of the present case. Professor Jones was an untenured associate professor at Southern Colorado State College. He alleged in his Complaint that, in February 1966, he had received "notice that his services would be terminated at the end of the academic year by a letter sent from the President and authorized by the Board" (410 F.2d at 1326): Professor Jones further alleged that he "was not reappointed . . . because he had exercised his constitutionally protected rights" of speech, publication and religion (*id.*).

On motion by the school authorities, the district court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The Tenth Circuit affirmed, en banc (two

judges dissenting), on the ground that the complaint alleged no "identified interest" protected by the Constitution (*id.* at 1328) since the contract had expired by its own terms and the professor had no tenure.[8]

In contrast, the appellate court in the present case rejected the reasoning of *Jones* v. *Hopper* and instead relied on its own reasoning in *Pred* and the Fourth Circuit's reasoning in the *Johnson* case. The *Pred* and *Johnson* cases make clear that a teacher's constitutional rights are not dependent on the existence of a contractual right. As stated in *Pred* (415 F.2d at 856):

> "Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractual one, nor could it be since no *right* to reemployment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights."

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[8] The Fourth Circuit in *Parker* similarly stated (348 F. 2d at 465): "We need not pass on the merits of the Fifth, Fourteenth and First Amendment deprivations and abridgement asserted by the Appellant, consisting of the Board's termination of his employment (1.) without a hearing and (2.) because of his instruction from a book which he said had been proscribed by the Board in violation of freedom of speech. Our decision rests entirely on the contract. By its terms Parker was only employed provisionally and wholly without academic tenure express or implied."

Similarly, in *Johnson*, the Fourth Circuit stated (364 F.2d at 179):

> "There is no vested right to public employment. No one questions the fact that the plaintiff had neither a contract nor a constitutional right to have her contract renewed, but these questions are not involved in this case. It is the plaintiff's contention that her contract was not renewed for reasons which were either capricious and arbitrary or in order to retaliate against her for exercising her constitutional right to protest racial discrimination."[9]

This Court is thus presented with a serious and open conflict of circuits on the First Amendment issue. Since numerous cases raising First Amendment issues parallel to that presented here are now pending in or have recently been decided by the lower federal courts,[10] the need to resolve the conflict is pressing.

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[9] The Seventh Circuit also aligns itself with the Fourth and Fifth Circuits in *Johnson* and *Pred*, and rejects the Tenth Circuit's reasoning in *Jones*. McLaughlin v. Tilendis, 398 F.2d 287, 289 (7th Cir. 1968): "[Even though the teachers involved] did not yet have tenure, the Civil Rights Act of 1871 gives them a remedy if their contracts were not renewed because of their exercise of constitutional rights. *Cf.* Bomar v. Keyes, 162 F.2d 136, 139 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

[10] For a partial listing of these First Amendment cases, *see* Brief of the NEA in Support of the Petition, App. 1a-4a, Jones v. Hopper, 397 U.S. 991 (1970).

II

There Is a Conflict Among the Circuits on the Issue Whether the Nonrenewal of a Nontenured Teacher's Contract Without Prior Written Notice and Hearing Violates His Rights to Procedural Due Process Under the Fourteenth Amendment.

The Complaint further alleged that the failure of the school authorities to provide respondent with proper notice and hearing on the nonrenewal of his contract had violated his rights to procedural due process. Building upon its previous decisions in *Ferguson* v. *Thomas*, 430 F.2d 852 (1970), and *Lucas* v. *Chapman*, 430 F.2d 945 (1970), the Fifth Circuit held in effect that Sindermann had a right to a hearing on the nonrenewal of his contract.[11] Such a hearing, said the court below, "must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition" (Pet. App. A, at 11).

The position taken by the Fifth Circuit in the present case, and in its previous decisions in *Ferguson* and

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[11] The court of appeals remanded the case for the lower court to determine whether Sindermann had what it termed to be "an expectancy of reemployment" (Pet. App. A, at 9). If he had such an expectancy, the court held, the College authorities would be required to give him proper notice and hearing (*id.* at 9-10) as specified by the Fifth Circuit's opinion in Ferguson v. Thomas, 430 F.2d 852, 856-57 (1970). If the trial court determined that Sindermann did not have an expectancy of reemployment, however, under the decision below, the College authorities would still have to give Sindermann a hearing because of his claim that his contract nonrenewal was "really a form of punishment for his exercise of constitutional rights" (Pet. App. A, at 10-11). NEA believes that the Fifth Circuit's concept of "expectancy of reemployment" is based on certain misconceptions and misinterpretations of decisional authority which utilize a *quasi-contract* or *tort* theory to define the outer limits of a *constitutional* interest to be protected. An analysis of this problem, however, is best left to briefs and arguments on the merits.

Lucas, conflicts with the position taken by the Eighth Circuit in *Freeman* v. *Gould Special School Dist.*, 405 F.2d 1153 (en banc), *cert. denied*, 396 U.S. 843 (1969), as well as by the Fourth Circuit in *Parker* v. *Board of Educ.*, 348 F.2d 464, *affirming* 237 F. Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), both of which also involved the nonrenewal of nontenured teachers' contracts.

In the present case, petitioners have argued that the nonrenewal of Professor Sindermann's contract had been a "matter . . . solely and entirely of discipline for insubordination" (R. 73). In the Eighth Circuit, this reason would presumably have been sufficient to deny Professor Sindermann any rights of procedural due process, for, as the court stated in *Freeman:* "Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses" (405 F.2d at 1161).[12] In contrast, the Fifth Circuit in *Lucas* had stressed that, if school authorities assert "a non-constitutional reason and the teacher claims it is a sham and that the real reason is one impinging on his constitutional rights, he must be afforded a hearing" (430 F.2d at 948).

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[12] In *Parker*, the Fourth Circuit held that, regardless of the reason, no probationary teacher is entitled to a hearing upon termination of his contract (348 F.2d at 465). As articulated by the trial court in *Parker:* "[U]nless there is a statute to the contrary, probationary teachers' contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing" (237 F.Supp. at 227).

The position taken by the Fifth Circuit is also in conflict with numerous decisions of State Supreme Courts. *See, e.g., DeCanio* v. *School Committee of Boston,* 260 N.E.2d 676 (Mass. 1970), *jurisdictional statement filed sub nom. Fenton* v. *School Committee of Boston,* No. 1026, Sup. Ct., O.T. 1970, Nov. 30, 1970; *Munro* v. *Elk Rapids Schools,* Dkt. No. 52508, Sup. Ct. Mich., Jan. 24, 1970, *rehearing granted,* Nov. 30, 1970. As stated in *DeCanio* (Jur. St.,[13] App. 8a): "Most of the cases in which the question has been considered have concluded that in the absence of a statute to the contrary a probationary teacher may be dismissed without a hearing."

There is a vital need for resolving the present conflict among the circuits, as well as between the Fifth Circuit and the highest courts of several states, as to the requirements of procedural due process in cases involving the nonrenewal of a nontenured teacher's contract. This issue constantly arises in teacher contract termination cases. At the present time, NEA is aware of at least four cases pending on appeal in the federal courts of appeals in which school authorities, without notice or hearing, had refused to renew the contracts of nontenured teachers. *Drown* v. *Portsmouth School District,* Dkt. No. 7667, 1st Cir.; *Orr* v. *Trinter,* Dkt. No. 20721, 6th Cir.; *Roth* v. *Board of Regents,* Dkt. No. 18490, 7th Cir.; *Shirck* v. *Thomas,* Dkt. No. 18790, 7th Cir. Many more of these cases are pending in the federal district courts. It is reasonable to assume that, unless certiorari is granted in the present case so that the decisional conflict on the procedural due process issue may be resolved, there will be an increasing flow of petitions to this Court for

[13] Reference is to the Jurisdictional Statement in Fenton v. School Committee of Boston, *supra.*

review of the very same issue, not only in the four named cases described, but also in cases yet to come.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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